Alaska Workers' Compensation Appeals Commission

Akeem J. Humphrey, Appellant, vs. Lowe's HIW, Inc. and New Hampshire Insurance Co., Appellees.	Final Decision Decision No. 179 March 28, 2013 AWCAC Appeal No. 11-021 AWCB Decision No. 11-0153 AWCB Case No. 200919541

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 11-0153, issued at Fairbanks on October 17, 2011, by northern panel members Amanda K. Eklund, Chair, Zeb Woodman, Member for Labor, and Krista Lord, Member for Industry.

Appearances: James M. Hackett, James M. Hackett, Inc., for appellant, Akeem J. Humphrey; Krista M. Schwarting, Griffin & Smith, Attorneys at Law, for appellees, Lowe's HIW, Inc. and New Hampshire Insurance Co.

Commission proceedings: Appeal filed December 29, 2011; briefing completed November 16, 2012; oral argument held March 5, 2013.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Akeem J. Humphrey (Humphrey), appeals a decision[1] by the Alaska Workers' Compensation Board (board), which related to his employment with appellee, Lowe's HIW, Inc. (Lowe's).[2] This appeal presents two issues. The board decided that

[1] *See Akeem J. Humphrey v. Lowe's Home Improvement Warehouse, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 11-0153 (Oct. 17, 2011). The decision was initially assigned an incorrect number, 11-0152.

[2] Where appropriate, "Lowe's" refers to both Lowe's HIW, Inc. and New Hampshire Insurance Co., its workers' compensation insurance carrier.

Humphrey "voluntarily withdrew himself from the workforce and did not seek alternative employment."[3] Accordingly, it declined to award him temporary total disability (TTD) benefits between late February 2010, when his employment with Lowe's ended, and May 2011, when his back surgery rendered him unable to work. Having denied Humphrey TTD benefits over this timeframe, the board reduced its attorney fee award to Humphrey's counsel by 30%.[4] Humphrey appealed the board's decision in these two respects. We, the Workers' Compensation Appeals Commission (commission), affirm the board's decision in terms of the first issue, and vacate the attorney fees award and remand that issue to the board.

2. Factual background and proceedings.

Humphrey was injured on November 30, 2009, while working for Lowe's, when a metal cantilever beam fell and struck his back and left shoulder.[5] The day of the injury, he sought medical treatment at Fairbanks Urgent Care Center. Physical examination revealed swelling and tenderness. The treating physician diagnosed thoracolumbar strain, suggested Humphrey should work to tolerance, getting help with lifting, and

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[3] *See Humphrey*, Bd. Dec. No. 11-0153 at 19.

[4] *See id*. at 39.

[5] R. 0001, 0012; Hr'g Tr. 233:8–235:17, 237:20–238:12, July 28, 2011. On December 3, 2009, Thomas Cox, a co-worker, submitted a hand-written report describing the incident:

> I was in the [forklift] positioning myself to reach up & grab the second to last beam to brace it. [Humphrey] was behind the cantilever removing a cross brace. When he removed said brace he stepped between the two beams, taking the path of least resistance. He did not notice that the last cantilever rack had swung 3-4 feet at the top toward the door & was coming back at him. I can not (sic) tell you if he was pinned & crushed or if it just landed on his back. My view was obscured by the I beam. R. 1410.

recommended ibuprofen and icing for pain.[6] The following day, Humphrey again sought treatment at Fairbanks Urgent Care Center for continuing back pain.[7]

Between December 2 and December 9, 2009, Humphrey treated at Tanana Valley Clinic several times. Initially, he reported increased pain in his left shoulder and left low back at the point of impact. Physical examination revealed moderate pain in the lumbar spine with motion. X-rays of the left shoulder taken that day revealed no acute injury. He was told to continue ice and ibuprofen as needed. Work restrictions limiting lifting, pushing, or pulling to no more than 12 pounds were recommended.[8] Subsequently, the restrictions were modified to include a recommendation that Humphrey should frequently change positions and avoid prolonged sitting.[9] On another visit, Humphrey reported increased pain "on the left side in the mid thoracic and lumbar back," worse with twisting. His physical examination was normal other than paraspinal pain with motion. There were more specific work restrictions placed on the length of time Humphrey spent standing or sitting.[10] When seen on December 9, 2009, Humphrey complained of continued low back pain mostly on the left side. He was told to follow his work restrictions to the letter.[11]

On December 13, 2009, Humphrey was standing on a shelf in his closet at home when the shelf collapsed. He fell and cut the underside of his left big toe. On being seen at the emergency room at Fairbanks Memorial Hospital, he received sutures. He did not injure his back.[12]

On December 15, 2009, Humphrey returned to Tanana Valley Clinic. He reported that his pain had improved but then his back "went out" again when he bent

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6 R. 1097-99.

7 R. 1094-96.

8 R. 1088-93.

9 R. 1087.

10 R. 1080-84.

11 R. 1075-77.

12 Exc. 103-04.

over to scan an item at work. He was taken off work for two days.[13] The following day, Humphrey treated with Matthew W. Raymond, D.O. He reported his back pain was no better and that he had not attended physical therapy because he could not take time off from work. Physical examination revealed a prominent spasm of the left paravertebrals from T10-L5.[14] On December 17, 2009, Humphrey treated with Zachary Werle, D.O, at Tanana Valley Clinic. Humphrey remarked that he was having difficulty with his temporary customer service position at Lowe's because it still required considerable lifting and bending. Dr. Werle recommended a leave of absence from work for two weeks to rest and attend physical therapy.[15]

Humphrey did not work from December 19, 2009, to January 3, 2010, during which time Lowe's paid TTD benefits to him. No other time-loss benefits were paid to him.[16]

During physical therapy sessions in January 2010, Humphrey reported to his therapist that he was doing better at work with light duty restrictions.[17] On January 29, 2010, he saw Dr. Werle, reporting that he was improving and looking forward to getting back to work full time. Dr. Werle modified Humphrey's lifting restrictions to frequent lifting up to 25 pounds.[18]

On February 12, 2010, Humphrey received a performance evaluation from Lowe's that was generally positive.[19] On February 16, 2010, he submitted a hand-

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13 Exc. 105-06.

14 R. 0921-22.

15 Exc. 107-09.

16 R. 0008-09.

17 R. 1040, 1039, 1036.

18 R. 1031-32.

19 R. 0363-65; Hr'g Tr. 410:13–411:12, Aug. 31, 2011.

written note to Lowe's, giving two weeks' notice "due to personal reasons. (no transportation no house)."[20]

On March 5, 2010, Humphrey had an x-ray of the lumbar spine performed at Dr. Werle's request. Radiologist Tyler Gill, M.D., stated his impression of the x-ray was grade 1 spondylolisthesis[21] at L4-L5.[22] Dr. Werle noted the L4 spondylolysis[23] and L4-L5 spondylolisthesis "well may explain his inability to recover from his recent injury with conservative measures & PT." He referred Humphrey to an orthopedist and ordered no heavy lifting or bending until further notice.[24]

On April 9, 2010, Humphrey saw David M. Witham, M.D. Dr. Witham diagnosed "subacute traumatic spondylolysis, L4" and ordered additional imaging studies.[25] On April 15, 2010, a multiplanar magnetic resonance imaging of Humphrey's lumbar spine confirmed "grade 1 spondylolisthesis at L4-L5 secondary to pars defects." A bone scan performed that same day was normal.[26] On April 20, 2010, Dr. Witham reported:

> The imaging findings were those of Grade I spondylolisthesis at L4-5, secondary to spondylolysis at L4. There was no evidence of dynamic instability on flexion and extension lateral views, and the triple phase bone scan did not reveal findings consistent with acuity, but that does not rule out the possibility that this occurred at the time of his work accident in November.[27]

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[20] Exc. 111.

[21] "Spondylolisthesis" is defined as "[a] forward displacement or slipping of one of the bony segments of the spine (i.e. of a vertebra) over its fellow below, but usually the slipping of the fifth or last lumbar (loin) vertebra over the body of the sacrum." J.E. Schmidt, *Attorney's Dictionary of Medicine*, Matthew Bender & Co., Inc., 1989 at S-185.

[22] R. 0902.

[23] "Spondylolysis" is defined as "[t]he disintegration or dissolution of a vertebra." *Attorney's Dictionary of Medicine*, at S-185.

[24] Exc. 112-15.

[25] Exc. 116.

[26] R. 1010-13.

[27] R. 1009.

Humphrey informed Dr. Witham that he intended to move to Henderson, Nevada. Dr. Witham recommended following up with a spinal surgeon there as he may be a candidate for surgical fusion of L4-5.[28]

On May 24, 2010, Humphrey filed a workers' compensation claim. He sought TTD benefits from the date of injury, permanent partial impairment (PPI) benefits, medical costs, penalty, interest, attorney's fees and costs.[29]

On seeing Humphrey on May 25, 2010, Dr. Witham stated his opinion that Humphrey was not medically stable.[30]

Charles F. Xeller, M.D., performed an employer's medical evaluation (EME) on May 28, 2010.[31] His report indicated that Humphrey had full range of motion, normal lordosis, and no spasm, but complained of midline low back pain. It was his opinion that Humphrey had a preexisting grade I spondylolisthesis at L4-5, not acute, and a soft tissue injury. He stated that Humphrey "might have, to some degree, lit up the underlying spondylolisthesis . . . but surgical intervention would not be indicated, certainly not a fusion for an area that does not show instability, and does not show acuteness of the injury, as his bone scan is negative."[32] Dr. Xeller did not think Humphrey needed additional treatment, other than over-the-counter anti-inflammatory medications and the use of a back brace for heavy lifting. Dr. Xeller's opinion was that Humphrey had reached medical stability and could return to work without restriction. Applying the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), Fifth Edition, Dr. Xeller gave Humphrey a 5% whole person

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28 R. 1009.

29 R. 0010-12.

30 R. 0864.

31 R. 0865-70.

32 R. 0868.

impairment rating.[33] In Dr. Xeller's opinion, the November 30, 2009, work injury was not the substantial cause of Humphrey's current complaints or disability.[34]

On June 7, 2010, Dr. Werle reported:

> [Humphrey's] medical condition has reached "medical stability" from the standpoint of conservative care. However, he was referred to a local orthopedic surgeon for his condition, who did recommend surgical intervention. This intervention could provide additional relief & improvement in his condition if he elects to pursue this treatment option.[35]

On June 16, 2010, Lowe's filed an answer to Humphrey's May 24, 2010, claim, denying all claimed benefits,[36] and filed a controversion notice, denying TTD benefits after February 16, 2010, medical treatment, and PPI benefits based on Dr. Xeller's rating. Furthermore, Lowe's alleged that, because Humphrey had voluntarily left his employment, he was not entitled to TTD. In denying medical treatment, Lowe's relied on Dr. Xeller's opinion that he suffered a soft tissue strain as a result of the work injury and had returned to pre-injury status. PPI benefits were denied as Dr. Xeller's rating was calculated using the fifth edition to the AMA *Guides,* rather than the sixth edition, and was thus invalid.[37]

On January 11, 2011, Humphrey saw Patrick S. McNulty, M.D. He recommended an analgesic discogram at L4-5 and opined Humphrey's "low back pain stems from his initial work related injury[.]"[38]

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[33] Alaska Workers' Compensation Division Bulletin 08-02 requires all PPI ratings performed after March 31, 2008, be calculated applying the sixth edition to the AMA *Guides.*

[34] R. 0869.

[35] R. 0873.

[36] R. 0016-18.

[37] R. 0005.

[38] R. 0961.

On January 21, 2011, Thomas L. Gritzka, M.D., performed a second independent medical evaluation (SIME).[39] Dr. Gritzka diagnosed "[s]ymptomatic 'Bertolotti's [S]yndrome' L5 plus grade 1 isthmic spondylolisthesis L4 on L5"[40] and explained:

> The examinee has a complex anomaly of the lumbar spine consisting of unilateral sacralization of the terminal lumbar vertebrae and PARS interarticularis spondylolysis with grade 1 spondylolisthesis at the level above the terminal vertebrae. This, or similar, minor anomalies of the lumbar spine occur in about 5% of the asymptomatic population. However, if an individual has "Bertolotti's [S]yndrome" and in addition has grade 1 spondylolisthesis with isthmic spondylolysis at the level above the partially sacralized vertebra, this type of minor anomaly typically is asymptomatic for an individual's entire lifetime unless there is a superimposed injury in which case the superimposed injury converts the previously asymptomatic minor anomaly to a symptomatic condition.[41]

It was Dr. Gritzka's opinion that the November 30, 2009, work injury was the substantial cause of Humphrey's current back condition, because it caused a permanent aggravation of his previously asymptomatic congenital defect. Dr. Gritzka stated that Humphrey's condition typically would not resolve with conservative treatment and recommended further evaluation, including a discogram. He predicted Humphrey would need an L4 to sacrum fusion.[42]

On February 2, 2011, Dr. McNulty performed an analgesic discogram. Humphrey reported complete relief of pain during the anesthetic phase of injection, confirming discogenic pain source. Dr. McNulty's opinion was that an "interbody type reconstruction is an appropriate consideration."[43]

On February 15, 2011, Dr. McNulty recommended spinal fusion surgery based on the results of the analgesic discogram. He stated:

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39 R. 0948-59.

40 R. 0958.

41 R. 0957.

42 R. 0958-59.

43 R. 0999-1000.

> Please note, this patient does not have Bertolotti's [S]yndrome, i.e. symptomatic sacralization of L5-S1, because of the 100% pain relief confirmed by analgesic discogram at L4-5. Please note, there is a report by a Dr. Thomas Gritska (sic) which does not reflect any knowledge of the analgesic discogram nor its results.
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> The response of the analgesic discogram is a definitive test to confirm the patient's symptomatic discogenic pain at the L4-5 level. The patient gives a definitive history of his injury occurring at work with significant trauma sustained. Accident occurred 11/30/09. The current need for surgery is directly work related as primary cause of requiring surgery at L4-5 due to work related injury of 11/30/09.[44]

On April 28, 2011, Dr. Gritzka's deposition was taken. He testified that spinal fusion surgery was reasonable and necessary to treat Humphrey's combined condition of Bertolotti's Syndrome and spondylolisthesis. He testified typical treatment for Bertolotti's Syndrome alone is conservative, consisting of injections, physical therapy, exercise, and bracing, but in the event of a combined condition, as in Humphrey's case, conservative treatment is not likely to be successful.[45] His opinion was Humphrey "had a pre-existent spondylolisthesis at L4-5 that was asymptomatic and it was rendered symptomatic by the [November 30, 2009] accident" and preexisting asymptomatic Bertolotti's Syndrome rendered symptomatic by the work injury.[46] In Dr. Gritzka's opinion, "the injury in this case is the substantial cause or the most important cause" of Humphrey's disability and need for medical treatment.[47]

On May 10, 2011, Stephen Fuller, M.D., performed another EME.[48] He diagnosed "pre-existing anomalous sacralization at L5-S1" and "pre-existing right sided L4 spondylolysis with resultant mild L4-5 spondylolisthesis."[49] Dr. Fuller believed the November 30, 2009, work injury caused a strain of the thoracic and lumbar paraspinal

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44 R. 1001.

45 Gritzka Dep. 22:22–24:1, April 28, 2011.

46 Gritzka Dep. 39:16-23, April 28, 2011.

47 Gritzka Dep. 32:14-16, April 28, 2011.

48 R. 1101-31.

49 R. 1121.

muscles, but did not aggravate or "light up" Humphrey's preexisting conditions. Dr. Fuller attributed his current symptoms to the December 13, 2009, fall in the closet at home, as it was after that time he began complaining of his lumbar spine "locking up."[50] In Dr. Fuller's opinion, the work injury could not have been "in any way severe" because there was no bruising, redness or abrasion to the skin, and Humphrey could not have tolerated any osteopathic adjustments with a fresh fracture, new disruption or a "lighting up" at L4-5. It was Dr. Fuller's opinion that many people with Humphrey's preexisting anomalous defect, which occurs in about 5% of the population, have no symptoms,[51] and that Humphrey suffered a temporary thoracic strain as a result of the work injury, which was fully resolved by January 29, 2010.[52] Dr. Fuller believed no additional medical treatment would be reasonable or necessary. Specifically, he concluded that spinal fusions conducted "'for pain only' have a rather dismal track record."[53]

On May 18, 2011, Dr. McNulty performed a spinal fusion at L4-5.[54]

On June 27, 2011, Dr. Fuller submitted an addendum to his May 10, 2011, EME Report:

> On 05/18/11, Patrick McNulty, M.D. performed a "360" fusion on Mr. Humphrey. Anteriorly, he placed a bone cage at L4-5. After closure, he then turned the patient over and widened the neural foramina at L4-5. He found a spondylolisthesis. He then performed a posterolateral L4-5 fusion, in addition to the previously performed anterior fusion procedure.
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> **CONCLUSION:**
> The above surgery does not alter the opinions previously issued on 05/10/11. The necessity for the above-noted surgery was not attributable

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50 R. 1121.

51 R. 1123-24.

52 R. 1121.

53 R. 1128.

54 R. 1005-06.

to the 11/30/09 event because the work incident did not cause the L4-5 pathology or spondylolisthesis, which clearly pre-existed.[55]

The hearing on Humphrey's claim extended over two days, July 28, 2011, and August 31, 2011.[56] Amy Taylor testified about her romantic relationship with Humphrey. They have one child together. She acknowledged there were conflicts in that relationship, admitting the couple split up many times, but that Humphrey never moved out of the home for more than a few days at a time. According to Taylor, Humphrey always had reliable transportation and a place to sleep. She and Humphrey moved to Nevada in May 2010.[57]

Humphrey testified that the day after the injury he could not move without extreme sharp pain in his back and left shoulder. He said he was placed on light duty work in the returns department at Lowe's, but that did not work, because he still had to lift things at times. He could not sit in that job, but it hurt to stand all the time. Humphrey testified in the period between December 2009 and February 2010, his back never improved and his work aggravated his pain. When he moved to Nevada in the spring of 2010, he could not lift anything, and he could not have continued to work. Humphrey viewed surgery as his last resort, and that he did not want it, but Dr. Witham recommended it. He is pleased with the results of the surgery.[58]

Humphrey further testified that on February 22, 2010, he was working at the register at Lowe's when he was paged over the building intercom system to manager Brandon Montgomery's office.[59] According to Humphrey, Montgomery then stated "[i]t's not my decision; it's over me. They want - - they stated they want you to go

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55 R. 1133.

56 *See Humphrey*, Bd. Dec. No. 11-0153 at 1.

57 Hr'g Tr. 68:11-18, 80:30–81:17, 76:22-23, July 28, 2011.

58 Hr'g Tr. 236:21–238:8, 248:13–250:2, July 28, 2011; Hr'g Tr. 309:24–310:5, 311:3–312:2, 318:17–319:15, 308:24–309:18, 322:3-7, Aug. 31, 2011.

59 Hr'g Tr. 311:3-14, Aug. 31, 2011.

ahead and go through with your two weeks' notice."[60] Humphrey testified that Montgomery stated "that I can resign and have an opportunity to come back whenever I'm - - whenever my whole back and everything is done, or I could be terminated."[61] He explained that he had previously given two weeks' notice because he had been having transportation problems, but he had withdrawn that notice. Humphrey was paid through March 1, 2010.[62]

On cross-examination, Humphrey acknowledged that he had not told his doctors the truth, that he had told them he was better than he was. When asked to explain the inconsistency between his actual condition and his condition as he reported it to Lowe's, Humphrey stated he was willing to do anything to keep his job, that he felt like he wasn't doing anything [on light duty] and was afraid he would lose his job. He didn't want to complain. Humphrey admitted that Lowe's never gave him any indication his employment was in jeopardy due to his back condition, but he didn't want any reason to be fired or to cause any problem because he needed his job.[63] When asked his opinion about why he was asked to leave Lowe's, he stated, "I - - honestly, I thought it was because I wasn't capable of doing the work that I did do."[64]

Dr. Fuller testified telephonically on July 28, 2011. According to him, Humphrey's work injury was not the cause of his preexisting condition becoming symptomatic, as evidenced by the bone scan, which did not show any "hot spot" in the L4-5 region, and therefore no new trauma. Immediately following the injury, Humphrey reported vague pain in the thoracolumbar region, not at L4-5. The metal cantilever beam struck him in the thoracic area, on muscle, not bone, and there was no bony tenderness on examination. Pain was on the point of impact only, and Humphrey complained of generalized back pain, not specifically lumbosacral pain. Dr. Fuller

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60 Hr'g Tr. 313:2-5, Aug. 31, 2011.

61 Hr'g Tr. 316:6-9, Aug. 31, 2011.

62 Hr'g Tr. 313:10-22, 317:13-16, Aug. 31, 2011.

63 Hr'g Tr. 341:4-14, 342:19–345:12, Aug. 31, 2011.

64 Hr'g Tr. 384:9-12, Aug. 31, 2011.

concluded that, more likely than not, the December 13, 2009, fall in the closet caused Humphrey's preexisting condition to become symptomatic. In his opinion, Humphrey was capable of light duty work between February 2010 and May 2011.[65]

Dr. McNulty testified telephonically on August 31, 2011. His opinion was that Humphrey's preexisting spondylolisthesis was asymptomatic until the November 30, 2009, work injury. The analgesic discogram performed in February 2011 provided 100% pain relief on injection, which confirmed the disc as the pain source. Dr. McNulty thought Humphrey was a good candidate for a spinal fusion because he had tried conservative measures without relief. In his view, the back surgery was "so far successful," and Humphrey was "making good progress, but still had room to improve." Dr. McNulty testified that Humphrey was not yet medically stable but it was probable he could return to light duty work before he reached medical stability. He described light duty work as lifting, pushing and pulling less than 10 pounds, no crawling, no lifting below waist level, and alternating between sitting and standing frequently. Dr. McNulty anticipated that he would release Humphrey to light duty work when he next saw him for a follow-up appointment, on November 9, 2011, and that Humphrey would reach maximum medical improvement in about 9-12 months post-surgery.[66]

Brandon Montgomery testified that he was hired as store manager of the Fairbanks Lowe's in early 2010. According to Montgomery, in February 2010, Humphrey submitted a two-week notice because of personal reasons, telling Montgomery he was giving notice because he was relocating to Nevada. He denied paging Humphrey to his office as Humphrey had testified, and that as store manager he does not have sole authority to fire employees. Managers are required to follow a code of progressive discipline, and all disciplinary actions are routinely documented in an employee's file. Montgomery was aware that employees could not be fired because

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[65] Hr'g Tr. 115:23–116:8, 121:9–122:24, 127:23–128:18, 131:16–132:3, 154:7-9, July 28, 2011.

[66] Hr'g Tr. 299:22-25, 257:13–258:19, 260:2-13, 261:7-13, 296:25–299:13, Aug. 31, 2011.

they have sustained an on-the-job injury. His understanding was Humphrey quit his job at Lowe's.[67]

Kimberly Cook testified that she was operations manager for Lowe's in Fairbanks while Humphrey worked there and was his supervisor. She tried to accommodate his work restrictions following the on-the-job injury. Cook described Humphrey as a great employee and wanted to keep him on. She indicated that he had problems complying with his work restrictions, and wanted to do more. As far as Cook was concerned, Lowe's accommodated Humphrey's restrictions and would have continued to do so had he not quit. According to Cook, Humphrey never told her he was having trouble, that she was the one who was imposing the work restrictions.[68]

Cook testified about the circumstances surrounding Humphrey's termination. She stated he put in his notice and then withdrew it and then resubmitted it and withdrew it again. Humphrey told her he was leaving due to personal issues and he was going to quit. There was no discussion about him being fired. Had there been a meeting giving Humphrey the option to resign or be terminated, she would have been present, along with Brandon Montgomery and the Human Resources Manager. There would have been written documentation in Humphrey's personnel file. Cook had no reason to terminate him. He was a good employee and an asset to the company.[69]

3. Standard of review.

"The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[70] Whether the quantum of evidence is substantial enough to support a particular finding

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[67] Hr'g Tr. 387:24–388:9, 388:21–389:10, 389:16-25, 390:5-9, 395:2-17, Aug. 31, 2011.

[68] Hr'g Tr. 404:19–406:16, 407:12–408:4, 408:17-24, Aug. 31, 2011.

[69] Hr'g Tr. 412:19–413:19, 414:4-12, 415:1-9, Aug. 31, 2011.

[70] AS 23.30.128(b). Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

is a legal question.[71] We exercise our independent judgment when reviewing questions of law and procedure.[72] An award of attorney fees by the board is reviewed under the abuse of discretion standard.[73]

Humphrey has requested that the commission apply the standard of review for the board's factual findings found in AS 23.30.122 and overturn the board's findings. The commission has recently had occasion to apply this standard of review.[74] The statute reads in relevant part: "The findings of the board are subject to the same standard of review as a jury's finding in a civil action."[75] A jury's finding in a civil action can be overturned only if "the evidence, when viewed in the light most favorable to the non-moving party [on a motion for judgment notwithstanding the verdict], is such that reasonable men could not differ in their judgment."[76] Paraphrasing *McKenna*:

> Adapting that standard to our review of the board's finding here, the commission concludes that we can overturn it only if the evidence, when viewed in the light most favorable to [Lowe's], reveals that the board's finding is unreasonable. Consistent with case law, the foregoing standard is an objective, deferential one. If there is room for diversity of opinion, then the finding is one for the board to make.[77]

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[71] *See, e.g., Tinker v. Veco, Inc.*, 913 P.2d 488, 492 (Alaska 1996).

[72] *See* AS 23.30.128(b).

[73] *See State, Dept. of Revenue v. Cowgill*, 115 P.3d 522, 524 (Alaska 2005)(footnote omitted).

[74] *See ARCO Alaska, Inc. v. McKenna*, Alaska Workers' Comp. App. Comm'n Dec. No. 174, 20 (Jan. 3, 2013)(*McKenna*).

[75] AS 23.30.122.

[76] *Alaska Children's Services, Inc. v. Smart*, 677 P.2d 899, 901 (Alaska 1984) (quoting *Holiday Inns of America v. Peck*, 520 P.2d 87, 92 (Alaska 1974)).

[77] *McKenna*, App. Comm'n Dec. No. 174 at 20 (citing *Holiday Inns of America*, 520 P.2d at 92 n.12).

4. Discussion.

a. There was substantial evidence in the record as a whole that Humphrey quit his job at Lowe's in February 2010.

Under AS 23.30.185, a claimant is entitled to TTD benefits while he or she is disabled,[78] until medical stability is reached. However, the Alaska Supreme Court (supreme court) has consistently held that "[i]f a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability."[79] Here, in the aftermath of the incident when Humphrey was injured, his medical providers released him to perform light-duty work and Lowe's provided it. Therefore, he was not totally disabled. The issue then becomes whether Humphrey voluntarily left the labor market, that is, quit, or he was fired for, as he put it, an inability to perform his job.

Humphrey presented evidence at the hearing before the board that, even with work restrictions, it was difficult for him to perform his job at Lowe's. There is no question that there was medical evidence, including Dr. Capistrant's medical records, which supported his position that he suffered an on-the-job injury and that injury necessitated the work restrictions. He testified that he was terminated, that is, fired, by Lowe's because he could not do his job. Furthermore, Humphrey submitted that documentary evidence produced by Lowe's, which references his "termination" or that he was "terminated" in late February 2010,[80] supports his testimony that he was fired. Based on this evidence, he argues to the commission that substantial evidence in the record as a whole demonstrates that he did not voluntarily withdraw from the workforce and the board's finding to that effect was in error.

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[78] "Disability" as defined for workers' compensation purposes is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]" AS 23.30.395(16).

[79] *Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264, 266 (Alaska 1974)(footnote omitted).

[80] Exc. 013, 014, 015, 017.

In contrast, Lowe's presented evidence that Humphrey gave two weeks' notice in February 2010, that his intent was to relocate to Nevada, and that Lowe's management maintained that Humphrey quit, he was not fired. Before the commission, Lowe's argued that its personnel paperwork makes no distinction in terminology between an employee who is fired and an employee who quits. The forms simply reference "termination," which by definition can mean nothing more than "concluded."[81] Being terminated is not tantamount to being fired. In Lowe's view, this is substantial evidence that Humphrey quit; he was not fired.

On the issue of the circumstances of Humphrey's departure from Lowe's in February 2010, the board found the testimony of Brandon Montgomery and Kimberly Cook credible, whereas it found the testimony of Humphrey was not credible.[82] By statute, these credibility findings are binding on the commission.[83] Thus, the testimonial evidence tends to support the board's finding that Humphrey was not fired. Circumstantial evidence, that Humphrey received a positive evaluation from Lowe's,[84] that he gave notice,[85] and that he announced his intention to relocate to Nevada, also supports the board's finding. Ultimately, the documentary evidence surrounding Humphrey's termination is not necessarily indicative of his being fired; it shows that he was deemed suitable for rehire.[86] The commission concludes that the foregoing is substantial evidence supporting the board's finding that Humphrey quit his job at Lowe's in February 2010.

However, by statute, AS 23.30.122, the board's finding is also subject to review under the same standard as a jury's finding in a civil action. In conducting this review,

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81 Appellees' Br. 23.

82 *See Humphrey*, Bd. Dec. No. 11-0153 at 19.

83 *See* AS 23.30.128(b).

84 Exc. 010-11.

85 Exc. 111.

86 Exc. 015.

we are to view the evidence in the light most favorable to Lowe's. If the board's finding is reasonable, the commission cannot overturn it. We acknowledge that there is evidence that Humphrey was fired. Nevertheless, the board's finding that Humphrey quit was reasonable, given the evidence we referenced in the preceding paragraph.

Whether we apply the substantial evidence standard and/or the standard for reviewing a jury's finding in a civil action, the board's finding that Humphrey voluntarily quit his job was amply supported by the evidence. Humphrey is not entitled to TTD benefits between late February 2010 and May 2011.

b. The award of attorney fees is vacated and the issue remanded to the board.

By statute,[87] and board regulation,[88] in various circumstances, the board is empowered to make an award of attorney fees to counsel for a claimant for services

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[87] **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for

(footnote continued)

rendered. Here, Humphrey sought an award of attorney fees in the amount of $35,230.50.[89] The board awarded fees pursuant to the provisions of subsection .145(b).[90] It reduced the fees awarded by 30%, to $23,863.35. Its reason for reducing them was that Humphrey "did not prevail on the bulk of his TTD claim[.]"[91] However, based on Humphrey's briefing to the commission, he appears to be arguing for a fee award under AS 23.30.145(a),[92] not .145(b).[93] Under the circumstances, we conclude that the award must be vacated and the issue remanded to the board for the reasons which follow.

AS 23.30.145(a) provides in relevant part that, when a claim is controverted, the board can direct the employer to pay the claimant's attorney's fees, in addition to the compensation awarded, but only on the amount of compensation controverted and awarded. In making an award under subsection .145(a), the board is to take into consideration the nature, length, and complexity of the services performed and the benefits resulting from the services. In contrast, AS 23.30.145(b) states that if an employer otherwise resists the payment of compensation or medical and related benefits, and the claimant has employed an attorney in the successful pursuit of the claim, the board is to make an award of reasonable attorney fees. Case law provides that under subsection .145(b), the fee award should bear a relationship to the issues on

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> the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

88 *See* 8 AAC 45.180.

89 *See Humphrey*, Bd. Dec. No. 11-0153 at 39.

90 *See id*. at 26-27, 37-39.

91 *Humphrey*, Bd. Dec. No. 11-0153 at 39.

92 Appellant's Br. 31-42, Appellant's Reply Br. 17-19.

93 The supreme court instructs that these two subsections provide separate alternatives for attorney fee awards. *See Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 840 (Alaska 1973).

which the claimant prevailed.[94] An award of full fees is inappropriate where the claimant does not prevail on all issues.[95]

Here, in connection with his claim, Humphrey sought TTD benefits from the date of injury, PPI benefits, medical costs, penalty, and interest.[96] Lowe's controverted TTD benefits, PPI benefits,[97] and medical treatment.[98] TTD was controverted on two grounds: 1) Humphrey quit, and 2) he had returned to pre-injury status and was medically stable. Humphrey prevailed on his claims for medical benefits and he partially prevailed on his claim for TTD benefits, the two issues which were the most intensely contested by the parties. He also was awarded interest on his medical costs. On the other hand, he was unsuccessful on his claim for a penalty, and any award on his claim for PPI benefits was not ripe, as he had not yet been validly rated. The criteria for application of AS 23.30.145(a) in this case were met. Under that subsection, attorney fees could have been awarded on the amount of compensation controverted and awarded, specifically the medical costs and TTD benefits.[99]

Alternatively, after initially paying some medical benefits and TTD, Lowe's resisted payment of the lion's share of the medical and TTD benefits sought by Humphrey by contesting his entitlement to those benefits before the board. Humphrey prevailed on the medical costs issue and partially prevailed on the TTD benefits issue. In terms of case law, it would not have been appropriate for the board to award him

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[94] *See Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 241 (Alaska 1997).

[95] *See Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002).

[96] Exc. 002-04.

[97] The basis for the controversion of PPI benefits was that Dr. Xeller used the wrong addition of the AMA *Guides* in calculating the percentage of impairment. Exc. 008.

[98] Exc. 008.

[99] Humphrey calculated his past medical costs incurred in Nevada alone to be $230,132.56. His TTD benefits through July 2012 were calculated to total $20,064.80. Appellant's Br. 39-40.

full attorney fees and it did not, for the reason mentioned. Otherwise, the criteria for awarding attorney fees under AS 23.30.145(b) were met as well.

The commission is to review awards of attorney fees under the abuse of discretion standard. Here, we are not declaring that the board abused its discretion in awarding attorney fees in the amount it did. However, we are reluctant to affirm the award for two reasons. First, the lack of any explanation by the board for not awarding attorney fees under subsection .145(a) is troubling to the commission.[100] Second, the board's relatively terse explanation for reducing the award prevents meaningful review by the commission of its award under subsection .145(b). Under the circumstances, we think the appropriate resolution is to vacate the board's award and remand the matter to the board so that it might revisit the issue.

5. Conclusion.

The commission AFFIRMS the board's decision that Humphrey is not entitled to TTD benefits between February 2010 and May 2011. The commission VACATES the board's award of attorney fees and REMANDS that issue to the board.

Date: *28 March 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

This is a final decision on the merits of this appeal as to the appeals commission's affirmation of the board's decision in part and vacated in part of the board's decision in part. This is a non-final decision as to the appeals commission's remand of the matter

[100] If, for example, in the board's view, fees calculated under subsection .145(a) might yield an excessive award, *see Haile*, 505 P.2d at 839, it would be helpful for the board to say so.

in part to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to 1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal Procedures sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL PROCEDURES

Appeal

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[101] and be brought by a party-in-interest against all other parties to the proceedings before the

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[101] A party has 30 days after the distribution of a final decision of the commission to file an appeal with the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

Petition for Review

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.[102]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that, with the exception of changes made in corrections of typographical and grammatical errors, this is a full and correct copy of the Final Decision No. 179 issued in the matter of *Akeem J. Humphrey v. Lowe's HIW, Inc. and New Hampshire Ins. Co.,* AWCAC Appeal No. 11-021, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 28, 2013.

Date: *March 29, 2013*

Signed
B. Ward, Commission Clerk

[102] A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). *See* n.70 for Rule of Appellate Procedure 502(c).